UNPUBLISHED

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

THERESA M. ZEIGLER, individually; and THERESA M. ZEIGLER, as mother and next friend of MADISEN ZEIGLER, Plaintiff, vs. FISHER-PRICE, INC., Defendant.	**No. C01-3089-PAZ** **ORDER ON MOTIONS TO PRECLUDE EXPERT TESTIMONY AND TO BIFURCATE**

TABLE OF CONTENTS

I. INTRODUCTION

This matter is before the court on the motion of the defendant Fisher-Price, Inc. ("Fisher-Price") to bifurcate the trial of the plaintiff's punitive damage claim from the trial of the other issues in the case (Doc. No. 94), and Fisher-Price's motions (Doc. Nos. 95 & 96) to preclude the testimony of the plaintiff's experts pursuant to *Daubert v. Merrill Dow Pharmaceutical, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993), as extended by *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999).

Fisher-Price filed its bifurcation motion on June 13, 2003, together with a supporting brief (Doc. No. 95). The plaintiff Theresa Zeigler ("Zeigler") filed a resistance to the motion on June 24, 2003 (Doc. No. 102). On June 16, 2003, Fisher-Price filed separate motions to preclude the testimony of Bruce Wandell and Eric Jackson. (Doc. Nos. 96 & 97) These motions were supported by briefs, and a binder containing several exhibits. (*Id.*) Zeigler filed resistances to these motions on June 25, 2003 (Doc. Nos. 103 & 104). The court held a hearing on the motions during the final pretrial conference on June 26, 2003. The plaintiff was represented at the hearing by Stephen F. Avery. Fisher-Price was represented by Cheryl A. Possenti and Kevin M. Reynolds.

This is a diversity case that arises from a fire which occurred on June 1, 2001. The fire damaged the home, garage, and personal property of Zeigler and her daughter, Madisen Zeigler. In this lawsuit, Zeigler claims the fire was caused by a defect in a "Barbie Sun Jammer Jeep," a toy vehicle given to Madisen for Christmas a few years earlier. At the time of the fire, the toy vehicle was parked in the garage. Zeigler claims the toy vehicle was plugged into a charger when the fire occurred. Zeigler proposes to call two experts to testify about the origin and cause of the fire, to-wit: Bruce Wandell ("Wandell") and Eric Jackson ("Jackson").

Fisher-Price seeks to bifurcate Zeigler's punitive damage claim from the trial of the other issues in the case. Fisher-Price also seeks to prohibit the testimony of Wandell and Jackson, claiming their opinions are not reliable under the *Daubert* standards. The court first will discuss the standards applicable to Fisher-Price's *Daubert* motions. The court next will examine the particular testimony Fisher-Price seeks to exclude from the trial, and apply the applicable law to determine whether the testimony should be excluded. The court then will consider the motion to bifurcate

II. LAW APPLICABLE TO ADMISSIBILITY OF EXPERT TESTIMONY

A. Expert Testimony in General

In a diversity case in federal court, the question of whether expert testimony is admissible is generally a matter governed by federal, rather than state, law. *Clark v. Heidrick*, 150 F.3d 912, 914 (8th Cir. 1998) (citing *Fox v. Dannenberg*, 906 F.2d 1253, 1258 (8th Cir. 1990)); *see Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 711 (8th Cir. 2001) ("*Wheeling*").

In *Daubert*, the Supreme Court explained that under the Federal Rules of Evidence, and particularly Rule 702, a trial judge is charged with a gate-keeping responsibility to ensure all expert testimony or evidence admitted at trial is relevant, reliable, and "'will assist the trier of fact to understand the evidence or to determine a fact in issue.'" *Daubert*, 509 U.S. at 589, 113 S. Ct. at 2795 (quoting Fed. R. Evid. 702; emphasis removed). The Court noted an expert witness "is permitted wide latitude to offer opinions, including those that are not based on firsthand knowledge or observation. . . . Presumably, this relaxation of the usual requirement of firsthand knowledge . . . is premised on an assumption that the expert's opinion will have a reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592, 113 S. Ct. at 2796.

When proposed expert testimony is scientific in nature, the trial judge must make "a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." *Daubert*, 509 U.S. at 592-93, 113 S. Ct. at 2796. Although the Court expressly declined to set out a definitive checklist or test for making this determination, the Court noted several key areas of inquiry that ordinarily will apply "in determining whether a theory or technique is scientific knowledge that will assist the trier of fact," including: (1) whether the theory or technique "can be (and has been) tested"; (2) "whether the theory or technique has been subjected to peer review and publication"; (3) the "known or potential rate of error . . . and the existence and maintenance of standards controlling the technique's operation"; and (4) whether the theory or technique has obtained general acceptance within the community. *Daubert*, 509 U.S. at 593-95, 113 S. Ct. at 2796-97.

The Court observed that this inquiry is flexible. "Its overarching subject is the scientific validity -- and thus the evidentiary relevance and reliability – of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 594-95, 113 S. Ct. at 2797. The trial court's ultimate task is to ensure "that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand. Pertinent evidence based on scientifically valid principles will satisfy those demands." *Daubert*, 509 U.S. at 597, 113 S. Ct. at 2799. *See United States v. Boswell*, 270 F.3d 1200, 1204 (8th Cir. 2001)

In *Kumho*, the Court extended the *Daubert* inquiry to *all* types of expert testimony, not just to scientific testimony. The Court noted that in the trial court's inquiry into the relevance and reliability of expert testimony, the trial court *may* consider the factors which the *Daubert* Court suggested might be relevant. Noting that in some cases an expert's personal knowledge or experience may be the focus, as opposed to the scientific foundation of an opinion, the Court held the *Daubert* factors "may or may not be pertinent in assessing

reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony." *Kumho*, 526 U.S. at 150, 119 S. Ct. at 1175 (citation omitted). The circumstances of each particular case will determine the precise nature of the inquiry to be undertaken by the trial court in performing its gate-keeping function under *Daubert*. *Id.*

The *Kumho* Court explained further, "The trial court must have the same kind of latitude in deciding *how* to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys when it decides *whether or not* that expert's relevant testimony is reliable." *Kumho*, 526 U.S. at 152, 119 S. Ct. at 1176 (emphasis by the Court).

In its capacity as gatekeeper, the trial court is to "separate[ ] expert opinion evidence based on 'good grounds' from subjective speculation that masquerades as scientific knowledge." *Glastetter v. Novartis Phar. Corp.*, 252 F.3d 986, 989 (8th Cir. 2001). Although the trial court has substantial latitude to determine whether offered expert testimony is reliable, the court should keep in mind that Rule 702 reflects a liberalized approach to the admissibility of expert testimony. *See United States v. Larry Reed & Sons Partnership*, 280 F.3d 1212, 1215 (8th Cir. 2002) ("Trial courts have substantial latitude to determine whether specific expert testimony is reliable, and they may consider some or all of the factors listed in *Daubert* . . . when evaluating reliability."); *Lloyd v. American Airlines, Inc. (In re Air Crash at Little Rock, Ark.)*, 291 F.3d 503, 514 (8th Cir. 2002) (same); *Lauzon v. Senco Prods., Inc.*, 270 F. 3d 681, 685-86 (8th Cir. 2001) ("Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony," citing *Weisgram v. Marley Co.*, 169 F.3d 514, 523 (8th Cir. 1999)); *Arcoren v. United States*, 929 F.2d 1235, 1239 (8th Cir. 1991) (Rule 702 is a rule of admissibility rather than exclusion). Trial courts should apply the principle that "[e]xpert testimony is admissible if it is reliable and will help the jury understand the evidence or decide a fact in issue."

Hartley v. Dillard's, Inc., 310 F.3d 1054, 1060 (8th Cir. 2002). "[D]oubts regarding whether an expert's testimony will be useful should generally be resolved in favor of admissibility." *Miles v. Gen. Motors Corp.*, 262 F.3d 720, 724 (8th Cir. 2001) (citing *Heidrick*, 150 F.3d at 915). *See Lauzon*, 270 F. 3d at 687 n.2 (citing numerous authorities). A determination by a trial court to admit expert testimony is reviewed for abuse of discretion. *General Elec. Co. v. Joiner*, 522 U.S. 136, 143, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997); *Giles v. Miners, Inc.*, 242 F.3d 810, 812 (8th Cir. 2001).

In *Bonner v. ISP Technologies, Inc.*, 259 F.3d 924, 929 (8th Cir. 2001), the court emphasized that the focus under *Daubert* must be on the expert's principles and methodology, not the conclusions they generate. *See also United States v. Dico, Inc.*, 266 F.3d 864, 869 (8th Cir. 2001) ("Admissible expert testimony must be grounded upon scientifically valid reasoning or methodology.") The *Bonner* court explained:

> "As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination. Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded."

Bonner, F.3d at 929-30 (quoting *Hose v. Chicago N.W. Transp. Co.*, 70 F.3d 968, 974 (8th Cir. 1995) (internal citations and quotations omitted)); *see Hartley*, 310 F.3d at 1061 (same); *Wood v. Minnesota Min. & Mfg. Co.*, 112 F.3d 306, 309 (8th Cir. 1997) (same); *see also United States v. Dico, Inc.*, 266 F.3d at 869 ("The court must examine both the relevance and the reliability of the proffered testimony, *Blue Dane Simmental Corp. v. Am. Simmental Ass'n*, 178 F.3d 1035, 1040 (8th Cir. 1999), keeping in mind that the focus, of course, must be solely on principles and methodology, not on the conclusions that they generate.").

Expert testimony also must be "sufficiently tied to the facts of the case that it will aid the jury in resolving a factual dispute." *Concord Boat Corp. v. Brunswick Corp.*, 207

F.3d 1039, 1055 (8th Cir.) (citing *Daubert's* "fit" requirement), *cert. denied,* 531 U.S. 979, 121 S. Ct. 428, 148 L. Ed. 2d 436 (2000). Doubts regarding usefulness should generally be resolved in favor of admissibility. *Heidrick*, 150 F.3d at 915.

B. Reliance on Circumstantial Evidence

As discussed above, federal law generally governs the admissibility of expert testimony, and is applicable in determining whether the proffered testimony is relevant, reliable, and will assist the trier of fact. Other considerations also apply, however, when the testimony is directed at a substantive issue governed by state law, in which case the expert's competency is determined in accordance with state law. Fed. R. Evid. 601. *See Andrews v. Neer*, 253 F.3d 1052, 1062 (8th Cir. 2001) (recognizing Rule 601's deference when state law provides rule of decision, quoting 27 Charles Alan Wright & Victor James Gold, Federal Practice and Procedure ("Wright & Gold") § 6007, at 74 (1990)); *Unterreiner v. Volkswagen of America, Inc.*, 8 F.3d 1206, 1216 (7th Cir. 1993) ("'Rules 601 and 602 reveal an inclination to classify problems concerning the reliability of testimony as issues of witness credibility. Those rules further reflect the belief that questions concerning the credibility of witnesses should be decided by the jury and[ ] not the judge.'") (quoting Wright & Gold § 6022, at 195-96); *United States v. Cook*, 949 F.2d 289, 293 (10th Cir. 1991) (same, quoting 3 J. Weinstein & M. Berger, *Weinstein's Evidence* § 601[05], at 601-40 (1991)); *Lott v. C & W Trucking, Inc.*, 15 F. Supp. 2d 1167, 1169 (M.D. Ala. 1997) ("'[I]n general, . . . state law governs the competency of a witness where the proof is directed at a substantive issue governed by state law.'") (quoting *Barton v. American Red Cross*, 829 F. Supp. 1290, 1299 (M.D. Ala. 1993)). *Cf. Pollard v. Metropolitan Life Ins. Co.*, 598 F.2d 1284, 1286 (3d Cir. 1979) (Fed. R. Civ. P. defer to state law in diversity cases on certain presumptions, privileges, and competency issues, but federal rules govern admissibility of documentary evidence.)

Because Iowa substantive law governs Zeigler's claims in this case, the court will apply Iowa law in determining whether opinion testimony by Zeigler's experts and lay witnesses is based on reasonable inferences. In particular, the opinion testimony related to causation in this case is based in part on circumstantial evidence and inferences drawn from such evidence. The Iowa courts have considered the weight to be given to circumstantial evidence on numerous occasions.

In *Beck v. Fleener*, 376 N.W.2d 594 (Iowa 1985), the Iowa Supreme Court noted:

> [W]e no longer distinguish between the probative value of direct and circumstantial evidence. . . . The probative value of all evidence is determined under the basic standard of relevancy. For the guidance of the bench and bar, we point out that no useful purpose is served by attempting to instruct a jury on the difference between direct and circumstantial evidence.

Id., 376 N.W.2d at 597. *See Schermer v. Muller*, 380 N.W.2d 684, 687 (Iowa 1986) ("Direct and circumstantial evidence are equally probative, and generally questions of negligence, contributory or comparative negligence, and proximate cause are for the jury."); *accord Huber v. Watson*, 568 N.W.2d 787, 790 (Iowa 1997).

The Iowa Supreme Court has explained the weight circumstantial evidence must bear in order to be probative, as follows:

> Circumstantial and direct evidence are equally probative, *State v. O'Connell*, 275 N.W.2d 197, 205 (Iowa 1979), but the substantial evidence rule requires that the circumstances have "sufficient probative force to constitute the basis for a legal inference, and not for mere speculation. . . ." 32A C.J.S. Evidence § 1039, pp. 753-54 (1964); *see also* 30 Am. Jur. 2d Evidence § 1091, at 251 (1967) ("Circumstantial evidence must do more than raise a suspicion; it must amount to proof. It is necessary that there be some reasonable connection between the facts proved and the fact at issue."). Circumstances are not sufficient when the conclusion in question is based on surmise, speculation, or conjecture. *Green v. Ralston Purina Co.*, 376

> S.W.2d 119, 123-24 (Mo. 1964); *Adams v. Smith*, 479 S.W.2d 390, 397-98 (Tex. Civ. App. 1972).

Harsha v. State Savings Bank, 346 N.W.2d 791, 800 (Iowa 1984). *Accord Walls v. Jacob North Printing Co.*, 618 N.W.2d 282, 285 (Iowa 2000) ("Direct and circumstantial evidence are equally probative on [the] point [of causation in fact].") *See Oak Leaf Country Club, Inc. v. Wilson*, 257 N.W.2d 739, 746 (Iowa 1977) (Proof of proximate causation "may be by either direct or circumstantial evidence but in event the latter is used, it must be sufficient to make plaintiffs' theory asserted reasonably probable, not merely possible, and more probable than any other theory based on such evidence; however it is generally for the trier of fact to say whether circumstantial evidence meets this test." (Citations omitted.)); *Schoemann v. Fareway Stores, Inc.*, 2001 WL 1043215 at *3 (Iowa Ct. App. 2001) ("[T]he value of circumstantial evidence in suggesting causation . . . often meets or exceeds the probative value of direct evidence[.]") (citing *Randol v. Roe Enterprises, Inc.*, 524 N.W.2d 414, 417 (Iowa 1994)).[1]

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[1]Circumstantial evidence bears similar weight in a criminal context. *See State v. Inman*, 2001 WL 355635, at *2 (Iowa Ct. App. 2001) (unpublished disposition), where the court held as follows:

> Direct and circumstantial evidence are equally probative. [Citation omitted.] A verdict can rest on circumstantial evidence alone. *State v. Kirchner*, 600 N.W.2d 330, 334 (Iowa Ct. App. 1999). However, "the evidence must at least raise a fair inference of guilt as to each essential element of the crime. Evidence which merely raises suspicion, speculation, or conjecture is insufficient." *State v. Casady*, 491 N.W.2d 782, 787 (Iowa 1992) (citations omitted). In addition, we note the element of intent is seldom susceptible to proof by direct evidence. *State v. Finnel*, 515 N.W.2d 41, 42 (Iowa 1994). Rather, proof of intent usually depends on circumstantial evidence and inferences drawn from such evidence. *Id.* "The fact finder may determine intent by such reasonable inferences and deductions as may be drawn from facts proved by evidence in accordance with common experiences and observation." *State v. Howard*, 404 N.W.2d 196, 198 (Iowa Ct. App. 1987). "The requirement of proof beyond a reasonable doubt is satisfied if it is more likely than not that the inference of intent is true." *Finnel*,

Obviously, the mere fact that Madisen Zeigler's toy vehicle was in the garage at the time of the fire is not probative, in and of itself, that the toy caused the fire. The circumstantial evidence upon which the plaintiff's experts rely in concluding the toy was the source of the fire must be sufficiently reliable to support the plaintiff's theory of the case. As the Iowa Supreme Court explained in *Brewster v. United States*, 542 N.W.2d 524 (Iowa 1996):

> Negligence must be proved, and "[t]he mere fact that an accident . . . has occurred, with nothing more, is not evidence. . . ." W. Page Keeton *et al.*, Prosser & Keeton on the Law of Torts § 39, at 242 (5th ed. 1984) [hereinafter Prosser]. To establish negligence, the plaintiff must produce evidence from which reasonable persons may conclude that, upon the whole, it is more likely that the event was caused by negligence than that it was not. *Id.*
>
> Negligence, however, is a fact and "like any other fact, may be proved by circumstantial evidence." *Id.* Circumstantial evidence is the proof "of one fact, or of a set of facts, from which the existence of the fact to be determined may reasonably be inferred." *Id.* Circumstantial evidence involves two things: (1) "the assertion of witnesses as to what they have observed," and (2) "a process of reasoning, or inference, by which a conclusion is drawn." *Id.* Circumstantial evidence "must be based upon the evidence given, together with a sufficient background of human experience to justify the conclusion." *Id.* at 243.
>
> When the plaintiff uses circumstantial evidence to establish negligence, the inference drawn "must cover all of the necessary elements of negligence, and must point to a breach of the defendant's duty." *Id.* As Prosser illustrates,
>
> > [t]he mere fact of the presence of a banana peel on a floor may not be sufficient to show that it has been there long enough for reasonable care to require the defendant to discover and remove it, but if it is "black, flattened out and gritty," the

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515 N.W.2d at 42.

> conclusion may reasonably be drawn. It is for the court to determine, in the first instance, whether reasonable persons on the jury may draw it.

Id. (citations omitted).

Brewster, 542 N.W.2d at 528.

With these principles in mind, the court turns to consideration of Fisher-Price's motions to preclude the testimony of Wandell and Jackson. The court must determine whether the proffered testimony of each of these witnesses is relevant, reliable, and will assist the trier of fact – in this case, the jury – in understanding the evidence or determining a fact in issue in this case. With regard to any reliance on circumstantial evidence, the experts' opinions must meet the standards discussed above, and must be based on reasonable inference, rather than pure speculation. *See Fedorczyk v. Caribbean Cruise Lines, Ltd.*, 82 F.3d 69, 75 (3d Cir. 1996).

III. DISCUSSION OF PROFFERED EXPERT TESTIMONY

A. Bruce Wandell

After graduating from high school, Wandell was a firefighter for two years and then a fire chief for ten years. During this time, he became a state-certified fire investigator. He then went to work as a special investigator for the Missouri State Fire Marshal's office, where he received certifications as a fire arson investigator from both the National Fire Academy and the National Fire Protection Association. He also took a number of courses on various subjects relating to fires and their causes. After about ten years as a fire arson investigator, he took a position as a "special investigator" for Allied Insurance ("Allied"), where he spent about 90 percent of his time investigating fire claims.

Allied insured the Zeigler home for fire losses. After the fire, Zeigler apparently submitted a claim, and on June 4, 2001, three days after the fire, Allied assigned Wandell

to do an "origin and cause investigation" of the fire. Wandell contacted Zeigler and told her he would meet her at the scene of the fire on June 5, 2001. On that day, Wandell met with Zeigler at the fire scene, and told her he was going to conduct a routine fire investigation to determine the origin and cause of the fire. He then examined the fire scene, asking Zeigler questions as he conducted his examination.

Wandell testified in his deposition that the standard procedure is to start a fire scene investigation at the area of the least damage and move to the area of the most damage. Taking photographs as he conducted his investigation, Wandell started his examination of the Zeigler fire scene at the exterior of the house, moved into the living area of the house, and then moved into the garage, which showed the most extensive fire damage. Once inside the garage, he again moved from the area of least damage to the area of most damage, and determined that the burn pattern indicated the fire had started along the northeast wall of the garage. He asked Zeigler whether anything in the garage was "energized" at the time of the fire, and she indicated the only items that were "plugged in" at the time of the fire were the toy car, which she indicated was attached to a battery charger plugged into an outlet in the northeast corner of the north wall, and a rechargeable power drill, which was plugged into an outlet over a workbench along the west wall. She explained the outlet into which the power drill was plugged was controlled by a light switch in the house that was turned off at the time of the fire. When Wandell began conducting his investigation, the toy vehicle had been removed by the fire department and taken to the fire station. In total, Wandell spent about four hours on his first visit to the fire scene.

After completing his walk-through of the fire scene, Wandell learned from an Allied adjuster, who also was on the scene, that the toy vehicle had been the subject of a recall by the Consumer Product Safety Commission ("CPSC"). Wandell took a recorded statement from Zeigler, and she denied any knowledge of the recall. Wandell then went to the fire department, where he looked at the toy vehicle and took some more pictures. While at the

fire department, Wandell was advised by one of the firefighters that when they were fighting the fire, the hottest area was on the north wall of the garage.

After returning from his initial visit to the fire scene, Wandell conducted some research on the Internet, and confirmed from the CPSC's web site that there had been a product recall on the toy vehicle. About a week after his initial investigation, Wandell talked on the telephone with the firefighter who had removed the toy vehicle from the fire scene, and the firefighter told Wandell the representatives of the fire department believed the fire had started in the area where the remains of the toy vehicle were found.

On June 11, 2001, Wandell returned to the fire scene, where he met James Finneran, a fire investigator retained by Fisher-Price. On that visit, Wandell did not conduct any further investigation, but he did take more photographs.

Shortly after his second visit to the fire scene, Wandell issued a report in which he concluded (1) the fire originated in the location of the toy vehicle, and (2) the toy vehicle caused the fire. He based these conclusions on the fact that he traced the origin of the fire to the location of the toy vehicle, and the physical damage in the area. He did not examine the toy vehicle to determine whether it malfunctioned, and does not claim to be qualified to conduct such an examination. Wandell testified during his deposition that he has no opinion to offer concerning the vehicle itself other than his conclusion that the vehicle was the origin and cause of the fire.

Fisher-Price argues Wandell should not be permitted to testify because "he failed to follow generally accepted scientific methods for fire investigation and for forming conclusions with respect to issues surrounding the cause and origin of fire as set forth in National Fire Protection Association 921 for Fire and Explosion Investigations." (Doc. No. 96, p. 2) The court disagrees. In its motion and brief, Fisher-Price mischaracterizes Wandell's testimony, quotes in detail from NFPA 921, and then engages in a hypertechnical analysis of why Wandell's testimony does not follow the standard.

The court finds Wandell followed an appropriate and generally accepted methodology, even under the strict standards of NFPA 921. Although some of his opinions are based on circumstantial evidence, the court finds his reasoning and experience suggest that his opinions are reliable. *See Smith v. Ford Motor Co.*, 215 F.3d 713, 718 (7th Cir. 2000) ("[A] court should consider a proposed expert's full range of practical experience as well as academic or technical training when determining whether that expert is qualified to render an opinion in a given area.") The court further finds his opinions would assist the jury in understanding the evidence and deciding the factual issues in the case.

To the extent Fisher-Price has raised doubts about the reliability of Wandell's opinions, those doubts are not sufficient to preclude his testimony, *see Miles v. Gen. Motors Corp.*, 262 F.3d 720, 724 (8th Cir. 2001), and can be addressed appropriately by cross-examination. *See Smith*, 215 F.3d at 718 ("[W]hen addressing whether expert testimony is reliable the district court should not consider the 'factual underpinnings' of the testimony but should determine whether '[i]t was appropriate for [the expert] to rely on the test that he administered and upon the sources of information which he employed,'" summarizing the holding in *Walker v. Soo Line R.R. Co.*, 208 F.3d 581, 587 (7th Cir. 2000)). *See also Daubert*, 509 U.S. at 596, 113 S. Ct. at 2798 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.").

Fisher-Price's motion to preclude the testimony of Bruce Wandell is **denied**. Of course, Fisher-Price is free to make appropriate objections to Wandell's testimony at trial.

B. Eric Jackson

Jackson has a Bachelor of Science degree in electrical engineering, and is a licensed professional engineer in several states. He also has been certified by the National Association of Fire Investigators as a Certified Fire and Explosion Investigator. Jackson

has worked on behalf of plaintiffs in several other cases involving Power Wheels toy vehicles, but he never testified in those cases.

On January 23, 2003, Jackson was contacted by Zeigler's attorney and asked to give opinions about the Zeigler fire. He was provided with pleadings from the case, discovery responses, a report from the fire department, and photographs of the scene and the subject Power Wheels toy vehicle. He also had materials from other sources, including information concerning the recall, which he had downloaded from the Internet; materials from other cases in which he had been involved; and a copy of a videotape showing how to complete repairs to Power Wheels mandated by the recall. Jackson did not visit the fire scene, and he never examined the remains of the Power Wheels toy vehicle involved in the fire.

Jackson testified at his deposition that he did not perform an origin analysis, but he had an opinion on the ignition source of the fire. In his deposition, he summarized his opinions as follows:

> I understand from Mrs. Zeigler's testimony that the car had been moved into the garage and was in the charging mode and left there. I believe she and her daughter left the house and were not at home when the fire occurred, and so the fire broke out in the garage while they were gone.
>
> Given the information I've come to learn about these cars and the problems they have and the retrofit kits that were sent out and the instructional videotape that was set out, along with the Consumer Product Safety Commission reports and other claims, the cars are a known source of fire causation both during operation, during charging modes, and in some instances I think the terminology has been used as spontaneous fire, just sitting there, not being operated and not being charged.
>
> Within the context of that, I've subsequently reviewed the depositions of several Fisher-Price employees who, through their testimony, confirm the fact that the connectors are known to heat up, and I believe they call them burning, or something

> burning, or something,[2] but at some stage they basically stop the analysis in terms of relayed between people in what they referred to as the Cage meetings to the extent that they haven't found anything that constitutes a complete fire, just a localized burning of connectors is apparently what I'm getting from their testimony.
>
> It's my opinion, based on all the information that the – The other thing that I gleaned from the testimony is that these claims of spontaneous fires and/or charging fires has been nonexistent since the H connector was changed to the A connector. It's not clear to me from the testimony whether or not there is any claims on these cars during that interim period where they had a retrofit kit on the A connector.
>
> But based on that testimony, the fact that there have been no fires since the use of the A connector, it's pretty self-evident, I believe, that the H connector is the problem, if not one of several problems that can occur with this car in terms of causing a fire.
>
> And I think the problem with these connectors, they're small, they're not as robust as the new connectors. I think they're subject to wear and breakage in a manner that ultimately allows for heating that will degrade the connector and give rise to a fire.

(Doc. No. 97-2, Jackson Depo. 1, at pp. 98-100)

Later in his deposition, Jackson expressed the following additional opinion:

> [T]he method by which Fisher-Price collects and preserves consumer warranty card information for use in disseminating recall notices is haphazard at best.
>
> To my knowledge, Fisher-Price has yet to disclose how they catalog such information into a database for future recall notice. It seems my memory of discovery in other cases, I

[2]Later in his deposition, Jackson clarified that no one from Fisher-Price reported burning of the connectors, but instead, they reported localized heating and melting. (Doc. No. 97-2, Jackson Depo. No. 1, at p. 110)

> don't think Fisher-Price actually collects this data and does anything to make sure that owners get a notice of recall.
>
> I think that was the case with Ms. Zeigler. As I understood her testimony she did fill one out, but did not receive a recall notice, so I believe in Ms. Zeigler's situation she did not have a chance to have a recall retrofit unit installed in her unit.

(*Id*. at 101-02)

Jackson testified he was unaware of any tests that would confirm a fire could result from the application of current through the H connector used on Power Wheels vehicles, and he acknowledged that he had not performed any such test. (*Id*. at 127)

The court concludes as follows from its review of Jackson's testimony. First, Jackson obviously is not qualified to give an expert opinion concerning the warranty record-keeping system at Fisher-Price. Second, Jackson did not perform an "origin" investigation of the Zeigler fire, and he therefore cannot give an expert opinion concerning the fire's origin. Third, he did no scientifically-supported investigation of the cause of the fire. Jackson states that in his opinion, the fire likely was caused by overheating of the H connector on the vehicle during recharging. There is very little evidence in the record to provide a scientific basis for this deduction. Instead, the opinion was, for the most part, based on his observations that the H connector was not as robust as the A connector that was used after the recall, and there was a significant number of fires involving Power Wheels before the recall but virtually none after the recall.

Jackson's observations represent common-sense deductions, not scientific opinions. As such, they are merely Jackson's unsupported personal observations, and should not be admitted into evidence. As the Supreme Court held in *Joiner*:

> [N]othing either in *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.

> A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

Joiner, 522 U.S. at 146, 118 S. Ct. at 519. *See In re Air Crash at Little Rock Ark.*, 291 F.3d at 514 (requiring adequate nexus between scientific theory and subject of opinion); *J.B. Hunt Transp., Inc. v. General Motors Corp.*, 243 F.3d 441, 444 (8th Cir. 2001) ("'Expert testimony that is speculative is not competent proof and contributes nothing to a legally sufficient evidentiary basis.'") (quoting *Concord Boat Corp.*, 207 F.3d at 1057); *Weisgram*, 169 F.3d at 521 (expert testimony not reliable where there is lack of nexus between theory and conclusion); *Clark v. Takata Corp.*, 192 F.3d 750, 756-57 (7th Cir. 1999) (in reaching opinion, expert may not assume as true a fact plaintiff is required to prove in order to recover).

Fisher-Price's motion to preclude Jackson from giving expert testimony is **granted in part**. Jackson will not be permitted to state an opinion as to the warranty record-keeping system at Fisher-Price, the origin of the fire, or the cause of the fire.

On the other hand, to the extent Jackson can explain to the jury, using generally accepted scientific principles,[3] what a connector is, the differences between the H connector and the A connector, how wear and breakage over time could affect each type of connector, and the potential heating effects of connectors after being subjected to wear and breakage, the court finds his testimony is admissible. Such testimony could assist the jury in answering the question of whether the Zeiglers' Power Wheels toy vehicle was a defective product. The court will permit Jackson to testify on these limited areas only. *See Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) ("Once initial expert qualifications and usefulness to the jury are established . . ., a district court must continue to perform its gatekeeping role by ensuring

[3]*See Clark v. Heidrick*, 150 F.3d 912, 914 (8th Cir. 1998) (experts who can offer a global understanding of the possible causes of an injury are useful to a jury).

that the actual testimony does not exceed the scope of the expert's expertise, which if not done can render expert testimony unreliable under Rule 702, *Kumho Tire*, and related precedents.") Counsel for the plaintiff is directed to instruct Jackson carefully on the limitations on his testimony, and ensure the witness does not exceed these limitations.

IV. MOTION TO BIFURCATE

Fisher-Price has moved to bifurcate trial of the punitive damages claim from trial of the other issues in the case. (Doc. No. 94) In its supporting brief (Doc. No. 95), Fisher-Price argues bifurcation is supported by the facts of this case, the Federal Rules of Civil Procedure, Iowa law, federal case law, and legal treatises. Fisher-Price claims "bifurcation will streamline, simplify, and potentially shorten the trial." (Doc. No. 95, p. 2) Zeigler disagrees, arguing bifurcation would extend the trial, create potential confusion for the jury, and add delay and expense.

"The decision of whether to isolate the punitive damages phase of the trial is within the sound discretion of the trial court." Even if the court errs in refusing to bifurcate the punitive damages phase, such error, "standing alone, will not typically warrant reversal." *Thorne v. Welk Investment, Inc.*, 197 F.3d 1205, 1213-14 (8th Cir. 1999) (citing *EEOC v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998)); *see Kostelecky v. NL Acme Tool/NL Indus., Inc.*, 837 F.2d 828, 832 (8th Cir. 1988) (same) (citing *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537 (8th Cir. 1977)); *see also E.E.O.C. v. HBE Corp.*, 135 F.3d 543, 551 (8th Cir. 1998) ("Consolidation of issues and claims is committed to the discretion of the trial court.") (citing Fed. R. Civ. P. 42(a)).

"[B]efore a decision to bifurcate may be made, the trial court, in the exercise of its discretion, must weigh the various considerations of convenience, prejudice to the parties, expedition, and economy of resources." *Emerick v. U.S. Suzuki Motor Corp.*, 750 F.2d 19, 22 (3d Cir. 1984). The court has weighed these factors and finds convenience, expedition,

and economy of resources all will be served by having a single trial of all the issues. Zeigler's proof relating to punitive damages will consume little, if any additional trial time.[4] Because Zeigler's proof relating to punitive damages is virtually identical to the proof relating to the other issues, it would be repetitive and unnecessarily time consuming to hold separate proceedings on the punitive damages claim.

Further, the court finds any potential prejudice to Fisher-Price resulting from a combined trial on all issues can be cured easily by appropriate jury instructions. The court trusts the ability of the jury to follow the instructions, and to reach a reasoned decision as to Fisher-Price's liability before turning to the issue of Zeigler's damages.

For these reasons, Fisher-Price's motion to bifurcate is **denied**.

V. CONCLUSION

Fisher-Price's motions to preclude Wandell's testimony is **denied**; its motion to preclude Jackson's testimony is **granted in part and denied in part**, as set forth above; and its motion to bifurcate is **denied**.

IT IS SO ORDERED.

DATED this 1st day of July, 2003.

PAUL A. ZOSS
MAGISTRATE JUDGE

[4]Zeigler's counsel stated at the final pretrial conference that any additional proof relating to punitive damages would not consume more than five minutes of trial time.

UNITED STATES DISTRICT COURT